

LUBA

AUG 15 4 52 PM '88

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

CHARLES FOSTER,
Petitioner,
vs.
CITY OF ASTORIA,
Respondent,
and
MELISSA A. YOWELL,
Intervenor-
Respondent.

LUBA Nos. 88-030/88-031

FINAL OPINION
AND ORDER

Appeal from the City of Astoria.

W. Louis Larson, Astoria, filed the petition for review and argued on behalf of petitioner. With him on the brief was Larson & Fischer.

No appearance by respondent City of Astoria.

Steven T. Campbell, Seaside, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Campbell, Moberg & Canessa, P.C.

HOLSTUN, Referee; BAGG, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 08/15/88

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner appeals City of Astoria orders approving a
4 conditional use permit and granting a variance from off-street
5 parking and loading requirements for a three unit bed and
6 breakfast.

7 MOTION TO INTERVENE

8 The applicant, Melissa A. Yowell, moves to intervene in
9 this proceeding. There is no objection to the intervention,
10 and it is granted.

11 FACTS

12 Intervenor-respondent (respondent) Yowell requested a
13 conditional use permit to allow an existing four bedroom single
14 family home in the city's High Density Residential (R-3) zone
15 to be used as a three unit bed and breakfast. The house is
16 located on a 50 x 100 foot lot. The lot includes such steep
17 grades that 40% of the lot is unusable. Other properties in
18 the area have similar topographical limitations.

19 The majority of the usable area of the lot is occupied by
20 the existing house. The property has insufficient space to
21 provide the five paved off-street parking spaces required to
22 comply with off-street parking requirements in the zoning
23 ordinance. Respondent requested a variance to allow the
24 proposed use of the property without complying with any of the
25 off-street parking and loading requirements in the zoning
26 ordinance.

1 Both a conditional use permit and a variance were approved
2 by the planning commission. The planning commission's decision
3 was appealed to the city council; and, following a de novo
4 hearing, the city approved the variance and conditional use permit.

5 FIRST ASSIGNMENT OF ERROR

6 "Respondent misconstrued the applicable law, made a
7 decision not supported by adequate findings, failed to
8 comply with the City of Astoria's Zoning Ordinance,
9 Section ZO 1.110 and made a decision not supported by
10 substantial evidence in the whole record in
11 determining that the proposed variance is not subject
12 to the general criteria for granting variances and
13 that Zoning Ordinance ZO 1.110 is not applicable to
14 the decision."

15 The parties dispute the applicability of Astoria Zoning
16 Ordinance (ZO) Section 1.110 to variances from off-street
17 parking requirements.¹ The zoning ordinance contains two
18 sections which establish standards for granting variances. The
19 first, ZO 1.110, provides as follows:

20 "Criteria for Granting Variances. Variances to a
21 requirement of this ordinance, with respect to lot
22 area and dimensions, setbacks, yard area, lot
23 coverage, height of structures, vision clearance,
24 decks and walls, and other quantitative requirements,
25 may be granted only if, on the basis of the
26 application, investigation and evidence submitted by
the applicant, all four expressly written findings are
made:

- 27 "1. That a strict or literal interpretation and
28 enforcement of the specified requirement would
29 result in practical difficulty or unnecessary [sic]
30 hardship and would be inconsistent with the
31 objectives of the comprehensive plan; and
- 32 "2. That there are exceptional or extraordinary
33 circumstances or conditions applicable to the
34 property involved or to the intended use of the
35 property which do not apply generally to other
36 properties in the same zone; and

1
2 "3. That the granting of the variance will not be
3 detrimental to the public health, safety, or
4 welfare or materially injurious to properties or
5 improvements in the near vicinity; and

6 "4. That the granting of the variance would support
7 policies contained within the comprehensive plan.

8 "Variances in accordance with this subsection should
9 not ordinarily be granted if the special circumstances
10 on which the applicant relies are a result of the
11 actions of the applicant or owner or previous owners.
12 ZO 1.110. (Emphasis added).

13 As the petitioner correctly notes, the record shows the
14 city determined ZO 1.110 did not apply to the request for a
15 variance from off-street parking requirements. Record 17-18.
16 Instead, the city concluded its variance decision was
17 controlled solely by ZO 1.115, which provides as follows:

18 "Variances to requirements of this ordinance with
19 respect to off-street parking and loading facilities
20 may be authorized as applied for or as modified by the
21 City Planning Commission, if, on the basis of the
22 application, investigation, and the evidence submitted
23 by the applicant, all three (3) of the following
24 expressly written findings are made:

25 "1. That neither present nor anticipated future
26 traffic volumes generated by the use of sites in
the vicinity reasonably require strict or literal
interpretation and enforcement of the
requirements of this ordinance; and

"2. That the granting of the variance will not result
in the parking or loading of vehicles on public
streets in such a manner as to materially
interfere with the free flow of traffic on the
streets; and

"3. That the granting of the variance will not create
a safety hazard or any other condition
inconsistent with the general purpose of this
ordinance or policies contained within the
comprehensive plan." ZO 1.115

1 Petitioner argues ZO 1.110 is a general provision explicitly
2 applicable to variances to "quantitative requirements".
3 According to petitioner there is no reason why both ZO 1.110
4 and 1.115 cannot or should not be applied to variances to
5 quantitative off-street parking requirements. We understand
6 petitioner to argue that while the criteria in ZO 1.110 and
7 ZO 1.115 are different, they are not incompatible. Therefore,
8 those sections are to be harmonized, with the result that
9 compliance with both sections is required. State v. Pearson,
10 250 Or 54, 58, 440 P2d 229 (1968).

11 Respondent first argues ZO 1.110 and 1.115 each are
12 specific provisions, and suggests that we need not attempt to
13 harmonize a general section (ZO 1.110) with a specific section
14 (ZO 1.115).

15 We disagree. The category "other quantitative
16 requirements" is open-ended and general. Respondent makes no
17 attempt to argue that none of the off-street parking
18 requirements fall within the literal meaning of "other
19 quantitative requirements." ZO 1.110. Some of those
20 requirements clearly are quantitative. See e.g.,
21 ZO .895(1)(a), footnote 1, supra.

22 Respondent is correct that in some instances specific
23 standards control over general standards. As the Court of
24 Appeals recently stated in Steamboaters v. Winchester Water
25 Control Dist., 69 Or App 596, 599, 688 P2d 92 (1984), rev den
26 298 Or 553 (1985):

1 "When, in the same statutory scheme, there is both a
2 specific provision and a general one, the latter of
3 which includes matter embraced in the former, and the
4 two cannot be harmonized, the particular provision
5 controls over the general. State v. Pearson, 250 Or
6 54, 40 P2d 229 (1968); League of Women Voters v. Lane
7 County Bdry. Comm., 32 Or App 53, 573 P2d 1255
8 (1977), rev den 283 Or 503 (1978)."

9 Applying this principle to the present case, respondent is
10 correct that ZO 1.115 rather than ZO 1.110 would apply, if the
11 requirements of ZO 1.110 and ZO 1.115 conflicted. Respondent
12 suggests, indirectly, that the sections do conflict.

13 " * * * Petitioner interprets [ZO 1.110] to mean that
14 parking variances are covered by this [sic] criteria,
15 as well as the criteria provided in ZO 1.115 because
16 they are quantitative. This interpretation is simply
17 inaccurate. The unequivocal language of ZO 1.110
18 makes it clear that if the criteria of that ordinance
19 [sic] are met, a variance is in order. It makes no
20 reference to ZO 1.115 or the criteria included
21 therein. For petitioner to prevail, this Court [sic]
22 must necessarily add language to one or the other of
23 the two ordinances [sic]. To follow petitioner's
24 interpretation, ZO 1.110 must impliedly include
25 language reading 'except for parking variances which
26 must also meet the criteria of ZO 1.115', or language
must be added to ZO 1.115 which reads, 'in addition to
the criteria required in ZO 1.110'." Respondent's
Brief 7-8.

19 There are at least three problems with respondent's
20 argument. First, we do not agree that for petitioner to
21 prevail in this proceeding we must add language to ZO 1.110.
22 Rather we are only required to interpret ZO 1.110 to include
23 off-street parking requirements that are admittedly
24 "quantitative." In other words, all we are required to do is
25 apply ZO 1.110 according to its terms. Northwest Natural Gas
26 Co. v. Frank, 293 Or 374, 381, 648 P2d 1284 (1982).

1 Second, to accept respondent's argument would effectively
2 require us to add language to ZO 1.110 to exclude quantitative
3 requirements that happen to be off-street parking requirements
4 or to add language to ZO 1.115 to state expressly that the
5 criteria therein are the only criteria applicable to off-street
6 parking requirement variances.

7 Finally, and most importantly, the text of the zoning
8 ordinance gives no indication that the city actually intended
9 ZO 1.115 to constitute the only criteria for variances to
10 off-street parking and loading requirements. Where ordinance
11 sections appear to be inconsistent, we are required to
12 harmonize those sections, if possible, so that conflicts are
13 avoided. Todd v. Bigham, 238 Or 374, 393, 395 P2d 163 (1964);
14 Springstead v. Lincoln Cas. Ins. Co., 232 Or 179, 183, 374 P2d
15 751 (1962). Similarly, we are to avoid literal interpretations
16 where to do so would lead to an absurd or unintended result.
17 Johnson V. Star Machinery Co., 270 Or 694, 705, 530 P2d 72
18 (1974). However, lacking any clear indication the city
19 actually had the legislative purpose respondent assumes it had,
20 we have no basis upon which to construe the language of the
21 zoning ordinance to accomplish that purpose. See Todd v.
22 Bigham, 238 Or at 393; Mallon v. Employment Division, 41 Or App
23 479, 484, 549 P2d 1154 (1979).

24 There is nothing in ZO 1.100, the variance purpose
25 statement, to suggest that ZO 1.115 contains the exclusive
26 criteria for off-street parking variances.² The most that

1 can be said is that ZO 1.115, read in isolation, gives no clear
2 indication that the criteria in ZO 1.110 must also be met.
3 However, we do not read sections from ordinance provisions in
4 isolation. Rather, we read ordinance provisions to give
5 meaning to all parts. Forest Highlands Neighborhood
6 Association v. Portland, 11 Or LUBA 189, 193 (1984). Despite
7 respondent's argument to the contrary, we have no basis for
8 assuming the city's purpose was to allow parking requirement
9 variances solely under the somewhat less exacting criteria in
10 ZO 1.115. While that may indeed have been the city's intent,
11 it is nowhere reflected in the zoning ordinance.³ We have no
12 authority to ignore the literal language in ZO 1.110 as
13 respondent requests. Mallon v. Employment Division, 41 Or App
14 at 484.⁴

15 We conclude ZO 1.110 expressly applies to quantitative
16 requirements. Because the off-street parking requirements that
17 were avoided by the variance include quantitative requirements,
18 ZO 1.110 applies. The county's interpretation of its zoning
19 ordinance to the contrary is erroneous.

20 The first assignment of error is sustained.

21 SECOND ASSIGNMENT OF ERROR

22 "The Respondent misconstrued the applicable law and
23 made a decision not supported by adequate findings by
24 failing to address the City of Astoria's Zoning
25 Ordinance Section ZO 1.110. Respondent's decision did
26 not address the "criteria" and therefore it was not
supported by substantial evidence in the record which
justified the decision to grant the total variance to
all of the Zoning Ordinance's applicable, onsite
parking and loading facilities requirements for the

1 proposed conditional use."

2
3 Petitioner argues that because the city concluded ZO 1.110
4 did not apply, it did not adopt findings demonstrating
5 compliance with ZO 1.110. Petitioner further argues there is
6 not substantial evidence in the record to support a decision
7 that the variance granted complies with ZO 1.110.

8 Respondent concedes the city did not adopt findings
9 specifically addressing ZO 1.110. However, respondent argues
10 the findings the city did adopt and the evidence in the record
11 are adequate to demonstrate compliance with ZO 1.110.

12 The city's findings need not be in any particular form as
13 long as they are sufficient to demonstrate compliance with
14 ZO 1.110. Sunnyside Neighborhood v. Clackamas County Comm.,
15 280 Or 3, 21, 569 P2d 1063 (1977). Findings adopted to address
16 other standards will suffice, if they demonstrate compliance
17 with ZO 1.110. Even if the findings the city adopted are not
18 adequate to show compliance with ZO 1.110, under ORS 197.835
19 (10)(b) we may overlook this error by the city, provided
20 respondent "identifies evidence in the record which clearly
21 supports the decision * * *." In other words, if respondent
22 can identify evidence that "clearly" shows the variance
23 complies with the criteria of ZO 1.110, we can overlook the
24 city's failure to adopt findings demonstrating compliance with
25 that section.

26 A. ZO 1.110(1) Practical Difficulty or Unnecessary
Hardship.

1 In reviewing local government decisions for compliance with
2 a variance criterion, we are guided by the language of that
3 specific criterion. Cope v. City of Cannon Beach, 15 Or LUBA
4 546 (1987); Fisher v. City of Gresham, 10 Or LUBA 283 (1984),
5 aff'd in part rev'd in part, 69 Or App 411 (1984). In Godfrey
6 v. Marion County, 3 Or LUBA 5, 9 (1981) we construed a variance
7 standard nearly identical to ZO 1.110 and noted

8 "this Board and the Oregon Appellate Courts

9 'have followed the rules subscribed to by most
10 jurisdictions that the hardship which must be
11 shown to obtain a variance must itself arise out
12 of conditions inherent in the land that
13 distinguish it from other land in the general
14 neighborhood. Erickson v. City of Portland, 9 Or
15 App 256, 262, 496 P2d 726 (1972); Lovell v.
16 Planning Commission of the City of Independence,
17 37 Or App 3, 586 P2d 99 (1978); Standard Supply
18 Company v. City of Portland, [1 Or LUBA 259
19 (1980).] Furthermore, the Oregon courts and LUBA
20 have generally held that the variance must be the
21 minimal variance necessary to make use of the
22 property. Id. Thus, practical difficulties and
23 unnecessary hardships must be conditions which,
24 without a variance, are shown to result in the
25 virtual uselessness of the property. Erickson,
26 page 262; Fasano v. Washington County Commission,
262 Or 574, 507 P2d 23 (1973)."

19 Petitioner contends the record shows "the property has been
20 used as a single family nonconforming dwelling for decades and
21 may continue to be so used." Petition for Review 17.

22 Respondent simply answers that the home on the property "is
23 a historical residence and cannot be maintained and the owner
24 is thus deprived of the beneficial use of her land."

25 Respondent's Brief 11. Even if we assume respondent is
26 correct that she cannot continue the existing single family use

1 of the historic residence, that does not demonstrate compliance
2 with ZO 1.110(1). We have no basis for concluding respondent's
3 "practical difficulty or unnecessary hardship" is inherent in
4 the land rather than personal. It is certainly not clear from
5 any evidence to which respondent cites us in the record that
6 the historical status of the existing residence presents
7 "practical difficulty or unnecessary hardship" inherent in the
8 land which would warrant excusing compliance with off-street
9 parking requirements to allow conversion of the existing single
10 family residential use to a bed and breakfast establishment.

11 This subassignment of error is sustained.

12 B. ZO 1.110(2) Exceptional or Extraordinary
13 Circumstances or Conditions Not Applying
14 Generally to Other Properties.

15 Petitioner argues there is nothing unusual about
16 respondent's property in that many properties in the area
17 suffer nearly identical topographical constraints.

18 Respondent does not cite evidence refuting petitioner's
19 contention and merely answers that "the degree to which
20 neighboring properties are able to use the full footage of
21 their property is not clear." Respondent's Brief 10.

22 To support a conclusion that the "exceptional or
23 extraordinary circumstances or conditions" are not shared by
24 other properties in the same zone, some minimal examination of
25 the other properties within the same zone is required. If
26 respondent wishes to take advantage of ORS 197.835(10)(b), she
cannot prevail simply by arguing that petitioner did not

1 adequately show that surrounding properties do have similar
2 constraints. ZO 1.110 requires respondent to show, and the
3 city to find, the constraints do not apply generally.
4 Respondent cites no evidence in the record suggesting this is
5 the case.

6 This subassignment of error is sustained.⁵

7 The second assignment of error is sustained.

8 THIRD ASSIGNMENT OF ERROR

9 "Respondent misconstrued the applicable law, made a
10 decision not supported by adequate findings and failed
11 to comply with City of Astoria Zoning Ordinance
12 Section 1.115 in approving a variance from the
13 ordinance requirement of 5 off-street parking spaces
14 for a three unit bed and breakfast in order to allow
15 the use to be initiated with no off-street parking
16 improvements."

17 Petitioner argues the city did not adequately address the
18 three review criteria in ZO 1.115, quoted supra. We address
19 the city's findings on each of these criteria below.

20 A. ZO 1.115(1). Anticipated Traffic Volumes Do Not
21 Require Literal Interpretation and Enforcement of
22 the Ordinance.

23 The city relied on traffic information provided by a
24 traffic expert whose credentials are not challenged by
25 petitioner. Petitioner argues, however, that the city in
26 addressing this criterion made a miscalculation regarding the
Average Daily Trips (ADTs) that the use can be expected to
generate.⁶ The expert stated the average single family
dwelling can be expected to generate 10 ADTs. The county found
as follows:

1 "While no specific data exists, Mr. Buttke estimated
2 that a three-unit bed and breakfast would generate up
3 to 18 ADTs. The more successful Astoria bed and
4 breakfast establishments have an average occupancy
5 rate of 45% to 50%. Optimistically assuming a 50%
6 occupancy rate, the proposed three-unit bed and
7 breakfast would be expected to generate approximately
8 10-12 ADTs, roughly comparable to the trips generated
9 by the average single family dwelling. At a 100%
10 occupancy rate, the proposed use would generate less
11 traffic than two average single family dwelling
12 units." Record 8-9; 65.

13 The city then found that because 17th street which fronts
14 the property is not heavily traveled and the proposed bed and
15 breakfast would generate comparable traffic to that generated
16 by one or two single family dwellings, the expected future
17 traffic volume did not warrant strict or literal construction
18 and application of the ordinance.⁷

19 Petitioner's sole attack on the city's finding under this
20 subassignment of error is that the city miscalculated the ADTs
21 to be expected from the proposed use by failing to recognize
22 the proposed bed and breakfast would include a single family
23 residence for the manager as well as the three bed and
24 breakfast units. According to petitioner, if the 10 ADTs that
25 can be expected from the residence for the manager are
26 included, the expected ADTs range from 20 to 28 rather than the
27 10 to 18 ADTs the city assumed.

28 While we can see the logic in petitioner's argument, we are
29 not sure the city incorrectly interpreted the assumptions
30 provided by Mr. Buttke. However, if the city did err, the
31 traffic generated would approximate what could be expected from

1 two to three single family dwellings rather than one to two
2 single family dwellings, as the city assumed. The petitioner
3 does not explain how this mistake, if it was a mistake, would
4 undermine the city's determination of compliance with this
5 criterion. We do not find this error sufficient to undermine
6 the city's finding that the traffic volume on surrounding
7 streets would not be so significant that strict or literal
8 interpretation and application of the zoning ordinance standard
9 is required.

10 This subassignment of error is denied.

11 B. Material Interference With Free Flow of Traffic
12 on Streets.

13 The county found the property has a total of 70 feet of
14 usable road frontage on 17th Street and Grand Avenue, a dead
15 end street adjoining respondent's property. This road frontage
16 is sufficient to accommodate parallel parking for three
17 vehicles. The city found other parking spaces are available
18 across the street from respondent's property on Grand Avenue.
19 The city also found other nearby portions of Grand Avenue and
20 17th Street could be utilized for off-street parking because
21 "neither are heavily utilized for off-street parking."
22 Record 10. The city noted the Astoria Public Works Department
23 indicated "that no unique, or unusual traffic hazards/conditions
24 exist on either 17th Street or Grand Avenue which would warrant
25 special attention." Record 7. Additionally, the city planning
26 director stated that "granting the variance would create no

1 safety hazards or conditions inconsistent with the policies of
2 the comprehensive plan or purposes of the zoning ordinances."
3 Record 66.

4 Petitioner contends that parallel parking on 17th Street is
5 difficult because of its steep grade. Petitioner further
6 argues Grand Avenue adjoining respondent's property is gravel
7 surfaced; and, if cars park on both sides of the road, cars
8 departing Grand Avenue may be required to back onto 17th Avenue
9 creating a dangerous condition for cars negotiating the steep
10 grade on 17th Avenue. Petitioner also cites testimony in the
11 record that car accidents have occurred in the area in the past.

12 We conclude the city's findings are adequate to support its
13 conclusion the standard of ZO 1.115(2) is met. Petitioner
14 accurately notes the evidence he cites contradicts the evidence
15 in support of the city's findings. However, the evidence the
16 city relied upon is evidence a reasonable person could rely
17 upon to conclude as the city did, notwithstanding the testimony
18 petitioner cites concerning accidents in the past and potential
19 traffic problems. See Younger v. City of Portland, ___ Or
20 LUBA ___ (LUBA No. 86-046, August 2, 1988), Slip Op at 20.

21 This subassignment of error is denied.

22 C. Safety Hazard Inconsistent With the General
23 Purpose of the Zoning Ordinance or Comprehensive
24 Plan Policies.

25 Petitioner cites testimony in the record by several
26 individuals that traffic safety problems exist in the area. As
with the city's determination of compliance with ZO 1.115(2),

1 we believe the city was justified in relying on testimony by
2 its planning director that such problems would not occur.
3 Despite the somewhat speculative testimony that the variance
4 may result in traffic hazards, we cannot fault the city's
5 conclusion that the rather minimal additional on-street parking
6 will not offend ZO 1.115(3). We conclude the city's findings
7 are adequate and that they are supported by substantial
8 evidence. See Younger v. City of Portland, supra.

9 This subassignment of error is denied.

10 The third assignment of error is denied.

11 FOURTH ASSIGNMENT OF ERROR

12 "Respondent misconstrued the applicable law, made a
13 decision not supported by adequate findings and failed
14 to comply with City of Astoria's Zoning Ordinance
15 Section 1.025 in approving the Yowell Conditional
16 Use. The Respondent failed to adequately address
17 review criteria ZO 1.025 (1) (2) (3) and (5)."

18 Petitioner next attacks the city's findings that the zoning
19 ordinance's conditional use approval standards are met.⁸

20 A. ZO 1.025(1) Demand For the Use.

21 ZO 1.025(1) states certain factors "should be considered"
22 in determining whether a demand for the proposed use at the
23 proposed location exists. Petitioner claims the findings "do
24 not fully address" these factors. Petition for Review 33.

25 Respondent cites us to the city's findings and claims those
26 findings "reflect a consideration" of the factors.

Respondent's Brief 15.

"Bed and breakfasts are normally located in

1 residential zones and, in Astoria, are allowed as
2 conditional uses in both the R-2 and R-3 zones. Bed
3 and breakfasts are not allowed in the R 1 zone. The
4 existence of an historic structure on the site makes
5 the proposed location particularly attractive for a
6 bed and breakfast use. Studies conducted in
7 conjunction with a proposed hotel/conference center in
8 Astoria indicate a need for additional overnight
9 accommodations. Bed and breakfast establishments
10 provide an alternative means of providing transient
11 accommodations. The Astoria Bed and Breakfast
12 Association has reported that existing bed and
13 breakfasts are experiencing high occupancy rates.

14 "Conclusion, a need for a bed and breakfast at the
15 proposed location exists." Record 7.

16 These findings are not responsive to the factors in ZO
17 1.025(1). They say nothing about accessibility for users or
18 availability and desirability of other sites. However, this is
19 not necessarily a basis for remand. Compliance with
20 ZO 1.025(1) requires only that a demand exist for the use at
21 the proposed location. ZO 1.025(1) only states the factors
22 listed "should be considered." Addressing the factors is not
23 mandatory. See Downtown Community Association v. City of
24 Portland, 80 Or App 336, 722 P2d 1259, rev den 302 Or 86
25 (1986); Standard Insurance Co. v. Washington Co., ___ Or
26 LUBA ___ (LUBA No. 87-020, September 1, 1987), slip op at
9-10. Consideration of these factors is not the only way to
demonstrate compliance with ZO 1.025(1).

Petitioner's challenge to the the city's finding that a
demand for the bed and breakfast exists is limited to the
failure of the findings to address the suggested factors.
Petitioner offers no other explanation for why the city's

1 determination that a demand exists may be defective.

2 This subassignment of error is denied.

3 B. ZO 1.025(2). Traffic Congestion and Burden on
4 Public Facilities and Services.

5 Petitioner simply reiterates his concern about the traffic
6 that will be generated by the bed and breakfast as discussed
7 under the third assignment of error, supra. Respondent simply
8 refers us to her prior responses to those concerns.

9 As discussed under the third assignment of error, we
10 conclude the findings the city adopted concerning traffic
11 congestion and burden on neighboring public facilities are
12 adequate and supported by substantial evidence.

13 This subassignment of error is denied.

14 C. ZO 1.025(3). Additional Space For Parking,
15 Yards, etc.

16 The parties agree the proposal does not meet this standard
17 without the variance discussed earlier in this opinion.
18 Because we conclude the variance was improperly granted, this
19 subassignment of error is sustained.

20 D. ZO 1.025(5). Adequate Site Design for Transportation
21 Activity.

22 Petitioner's argument under this assignment of error has
23 two parts. First, petitioner argues the proposed use will
24 adversely affect traffic and parking in the area. This part of
25 petitioner's argument was addressed more directly and rejected
26 under our discussion of his third assignment of error. It is
rejected here as well.

1 The second part of petitioner's argument is that the site
2 cannot meet on-site parking and loading requirements without a
3 variance. Respondent concedes that without the variance these
4 requirements are not met, and ZO 1.025(5) is violated.

5 Because we remand the city's decision granting the
6 variance, this subassignment of error is sustained in part.

7 The fourth assignment of error is sustained in part.

8 FIFTH ASSIGNMENT OF ERROR

9 "Respondent misconstrued the applicable law and failed
10 to consider and therefore omitted making a decision
11 supported by adequate findings relative to Astoria
12 Zoning Ordinance requirement for side yard set backs
which became applicable due to the change of use of a
non-conforming use; Section ZO 1.185 and ZO 1.165."

13 Petitioner notes the existing structure on the property is
14 a single family dwelling. The lot is 50 feet wide and the
15 house is 32 and 1/2 feet wide. Under ZO 1.165, combined side
16 yard setbacks are required to total 20 feet. Accordingly, the
17 existing structure is not conforming.⁹ Petitioner claims
18 that ZO 1.185 [sic ZO 1.085] requires "if a nonconforming use
19 is replaced by another use, the new use shall conform to this
20 ordinance." Petitioner argues that because the use is being
21 changed, the bed and breakfast must either comply with the side
22 yard requirements or obtain a variance.

23 The sections of the city's zoning ordinance concerning
24 nonconforming uses refer to both nonconforming uses and
25 nonconforming structures. ZO 1.085 refers exclusively to
26 nonconforming uses. Petitioner argues the change in use

1 requires not only that the new use conform with the ordinance,
2 but also that the existing nonconforming structure must comply
3 with the ordinance.

4 As respondent notes, the external structure and existing
5 side yard dimensions will not be changed because of the city's
6 decision. Furthermore, ZO 1.075 explicitly provides

7 "A structure conforming with respect to use but not
8 conforming with respect to height, setback or coverage
9 may be altered or extended if the alteration or
extension does not further deviate from the standards
of this ordinance."

10 ZO 1.085 is not offended by the city's decision. Neither
11 the existing single family dwelling nor the proposed bed and
12 breakfast are "nonconforming uses." However, if the existing
13 structure were to be modified, ZO 1.075 rather than ZO 1.085
14 would control. Petitioner does not claim the city's decision
15 approves modification of the structure or that ZO 1.075 is
16 violated by the city's decision.

17 The fifth assignment of error is denied.

18 The city's decision is remanded.

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FOOTNOTES

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As summarized in the city's findings, the off-street parking requirements that are the subject of the city's variance decision are as follows:

"ZO.180(4) requires that all uses comply with applicable access, parking and loading standards specified in ZO.885 through ZO.905.

"ZO.855 specifies that when the use of an existing structure is changed, off-street parking spaces shall be provided as set forth in ZO.885 to ZO.905.

"ZO.895(1)(c) requires that one space per guest room, plus two additional spaces for the owners or manager, be provided for a rooming or boarding house.

"ZO.905(7)(a) requires that off-street parking areas be paved.

"ZO.905(7)(c) requires that off-street parking areas with four or more spaces be served by a driveway.

"ZO.905(7)(d) requires off-street parking areas for commercial uses be landscaped.

"ZO.905(7)(e) requires that 80% of parking spaces be designated for full size vehicles." Record 6.

2

"ZO 1.100 Purpose. The purpose of a variance is to provide relief when a strict application of the zoning requirements would impose unusual practical difficulties and unnecessary hardships may result from the size, shape, or dimensions of a site or the location of existing structures thereon; from geographic, topographic, or other conditions on the site or in the immediate vicinity or from population densities, street location, or traffic conditions in the immediate vicinity. No variance shall be granted to allow the use of property for a purpose not authorized within the zone in which the proposed use would be located."

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Compare OAR 660-04-022 which provides acceptable reasons for an exception to statewide planning goals "[f]or uses not specifically provided for in subsequent sections of [OAR 660-04-022] or OAR 660, Division 14 * * *." Subsequent sections of OAR 660-04-022 and OAR 660, Division 14 provide reasons that may justify an exception for such specific uses.

4

Respondent also cites McCoy v. Linn County, 90 Or App 271, 275, ___ P2d ___ (1988) and suggests that we can take notice of the city's application of ZO 1.115 as the exclusive criteria for off-street parking variances in other cases as support for the city's decision in this case.

In McCoy, the Court of Appeals simply stated that a local government's interpretation of an ambiguous code or plan provision may be entitled to some deference if it is based on legislative history. Id. at 276; footnote 1. Post enactment decisions applying an ordinance provision are not legislative history. In addition, the record does not show the city's interpretation of ZO 1.115 has consistently been the interpretation urged by respondent in this case.

5

ZO 1.110 requires findings of compliance with all of the criteria in that section. Therefore we are required to remand for failure to comply with ZO 1.110(1) and (2) even if the review criteria in ZO 1.110(3) and (4) are satisfied by the city's decision. In this circumstance, and in view of the city's failure to adopt findings of compliance with ZO 1.110(3) and (4), we limit our review to ZO 1.110(1) and (2).

6

Average Daily Trips, or ADTs, are a measure of trip generation. Two ADTs equal one round trip. Record 65.

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The ordinance provision cited by petitioner, ZO .895, would require five off-street parking spaces. It is not entirely clear to us how strict or literal interpretation and enforcement of that provision would affect "traffic

1 volumes generated by * * * the site." ZO 1.115(1).

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4 The four conditional use standards challenged by
5 petitioner are as follows:

6 "1. A demand exists for the use at the proposed
7 location. Several factors which should be
8 considered in determining whether or not this
9 demand exists include: accessibility for users
10 (such as customers and employees); availability
11 of similar existing uses; availability of other
12 appropriately zoned sites - particularly those
13 not requiring conditional use approval; and the
14 desirability of other suitably zoned sites for
15 the use.

16 "2. The use will not create excessive traffic
17 congestion on nearby streets or overburden the
18 following public facilities and services: water,
19 sewer, storm drainage, electrical service, fire
20 protection, and schools.

21 "3. The site has an adequate amount of space for any
22 yards, buildings, drives, parking, loading and
23 unloading areas, storage facilities, utilities,
24 or other facilities which are required by city
25 ordinances or desired by the applicant.

26 * * * * *

27 "5. An adequate site layout will be used for
28 transportation activities. Consideration should
29 be given to the suitability of any access points,
30 on-site drives, parking, loading and unloading
31 areas, refuse collection and disposal points,
32 sidewalks, bike paths, or other transportation
33 facilities required by city ordinance or desired
34 by the applicant. Suitability, in part, should
35 be determined by the potential impact of these
36 facilities on safety, traffic flow and control,
37 and emergency vehicle movements." ZO 1.025

38 9

39 The city's zoning ordinance contains the following
40 definition:

41 "NONCONFORMING STRUCTURE OR USE: A lawful existing
42 structure or use, at the time of this ordinance or any

amendment thereto becomes effective, which does not conform to the requirements of the zone in which it is located." ZO .015.

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